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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

248

No. .....

JAMES E. LITTLE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

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Your petitioner, James E. Little, respectfully prays this Court for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, to Review a judgment of that Court in the above entitled cause being then numbered in that Court as Cause No. 17,401 (Criminal) and entered first on the 6th day of May, 1964 (Appendix, Exhibit B) but on rehearing, re-entered on a revised opinion on June 3, 1964 (Appendix, Exhibit D).

JUDGMENTS AND OPINIONS BELOW.

The initial Judgment below, in this case was the judgment of the District Court (No. 1) for the Eastern District of Missouri, Eastern Division, wherein the Court sentenced the petitioner (defendant) to be committed to serve four (4) years in the custody of the Attorney General on each of eight Counts, the sentences to run currently (Appendix, Exhibit A).

A timely appeal was filed to the United States Court of Appeals for the Eighth Circuit and after the filing of briefs and hearing arguments the said honorable Court rendered its decision and initial opinion on the 6th day of May, 1964 (Appendix, Exhibit B), and on petition for rehearing that Court entered an order amending the initial opinion but denying the Motion for Rehearing (Appendix, Exhibit C). This order was entered on the 3rd day of June, 1963.

It is this decision and opinion which your petitioner respectfully prays to be reviewed, set aside and reversed.

GROUNDS FOR INVOKING JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code. The petitioner urges that:

(a) The Court of Appeals for the Eighth Circuit has here rendered a Decision and Opinion contrary to principles and Opinions previously announced by the Supreme Court.

(b) The Court of Appeals for the Eighth Circuit has here rendered an Opinion in conflict with decisions and opinions of other United States Courts of Appeals on the same matters as those involved and decided in the Case at bar.

(c) The Court of Appeals for the Eighth Circuit has here rendered an Opinion involving an important question of Federal Law which has not been specifically settled but should be settled by this Court.

For the above reasons and on these grounds as more fully amplified below, your petitioner respectfully submits his prayer for a Writ of Certiorari to be issued to the United States Court of Appeals for the Eighth Circuit.

STATUTES CONFERRING JURISDICTION TO REVIEW.

§ 1254—Courts of Appeals; Certiorari; appeal; certified questions.

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree—**§ 1254 (1), Title 28, United States Code.**

STATUTE INVOLVED AND TO BE CONSTRUED IN CASE.

Title 15, U. S. C. 77q (a), also known as Section 15 of the Securities Act of 1933, which reads:

"77q. Fraudulent interstate transactions.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) To employ any device, scheme, or artifice to defraud, or

(2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

15 U. S. C. 77q (a) (1) (2) (3).

QUESTIONS PRESENTED FOR REVIEW.

Did each count of the Indictment set out a cause of action under Section 15 of The Securities Act of 1933, 15 U. S. C. 77q (a) (1), where the jurisdictional allegation is that a check was deposited to the defendant's credit in a bank in Tennessee and sent by that bank to Missouri for collection for its own account?

Is the proof of the deposit, with immediate credit to the defendant, of a check drawn on a Missouri Bank, deposited by the defendant in his Tennessee Bank, and drawn against by the defendant before the Tennessee Bank sent the checks to Missouri for collection, sufficient to create Federal jurisdiction and a violation of 15 U. S. C. 77q (a) (1), Section 15 of the Securities Act of 1933, where the Securities had been previously delivered by the defendant personally in Missouri after being prepared in Missouri?

Are the principles announced in the Cases of **Kann v. United States**[1] and **Parr v. United States**[2] concerning the use of the mails or interstate commerce as an es-

[1] Kann v. United States, 323 U. S. 88, 65 S. Ct. 148, 89 L. Ed. 88

[2] Parr v. United States, 363 U. S. 370, 80 S. Ct. 1171

sential part in the execution of a fraud, controlling in the consideration of a case under Section 15 of the Securities Act of 1933, 15 U. S. C. 77q (a) (1)?

Was the opinion of the United States Court of Appeals for the Eighth Circuit in this cause in conflict with the opinions of several of other United States Court of Appeals, such as the Ninth Circuit[1] and the United States Court of Appeals for the Fifth Circuit[2] and the United States Court of Appeals for the Seventh Circuit[3].

STATEMENT OF THE CASE.

The Indictment of the defendant, as it went to the jury on trial, contained eight counts, all identical except for the name of the alleged victims and the dates. The alleged victims, for the most part had been investing in oil leases in an oil field in Green County, Kentucky on the advice of friends and published news accounts in national magazines and trade journals which wrote glowing reports of this "shallow" field as one of the hottest in recent years. The Ashland Oil Company invested 3½ million dollars there to install a pipe line to Louisville. Later the defendant was hired as a salesman for the local St. Louis territory and he sold fractional interests for the Associated Drilling Co. While so engaged he purchased a tract of land, divided it into Blackburn A and Blackburn B leaseholds and sold fractional interests therein to his old customers under the name of Star Oil Co., for himself. He promised to drill two wells on each half and did have "Associated" drill and complete two wells on Blackburn A, but before he could drill any wells on Blackburn B, the "field" was shut down by the health authorities be-

[1] Carroll v. United States (1963), 326 F. 2d 72

[2] Getchell v. United States (1960), 282 F. 2d 68

[3] United States v. Schaffer (1962), 299 F. 2d 625 (7th)

cause of a salt-water problem and subsequently the "field" was virtually abandoned by all the prior investors, drillers, and developers. The customers, together with the defendant and Associated Drilling Co. and the developers all lost their capital investments. The defendant had also promised his customers that if the wells on Blackburn did not come in he would "put them" into other "producing acreage." The defendant spent some several months attempting to meet these promises but did not and when it became apparent that he had no "other producing" acreage available here, complaints were made to the Securities Agencies and the Federal Bureaus and the Indictment followed several years later. The Indictment charged that the defendant made fraudulent representations as to his own position with the Associated Drilling Co. and the oil production of the wells drilled, and what to expect from the newly opened acreage and that two wells would be drilled on the new acreage. These representations were allegedly made in person by the defendant, and after he sold the customers the "securities" he received checks in payment written against funds in Missouri Banks. It was charged that the federal laws were violated because the defendant deposited these checks in his Memphis Tennessee Bank, drew against this deposit and the Tennessee bank transported the checks back to Missouri for credit to its own account and payment.

The defendant's motions to dismiss the Indictment and for a directed verdict and for a new trial filed in proper sequence were all overruled. The jury found the defendant guilty on all eight counts. During the trial one of the jurors and a Government witness discussed some matters and socialized but at a hearing denied discussing the case specifically. The foreman of the petit jury was associated with a corporation with a financial position adverse to that represented by the defense counsels' firm of law-

yers in a civil suit but did not disclose this until after the trial.

The defendant's motions for a mistrial and for a New Trial were overruled and the defendant was sentenced to serve four years incarceration on each of the eight counts, to run concurrently. An appeal was duly filed to the United States Court of Appeals for the Eighth Circuit which "affirmed" and refused a rehearing on June 3, 1964.

REASONS FOR GRANTING THE WRIT.

(a)

The Decision and Opinion here of the Court of Appeals for the Eighth Circuit is in conflict with decisions of the Supreme Court of the United States, in matters involving the same legal principles.

The decisions by the Court of Appeals here is in direct conflict with the decision rendered by the United States Supreme Court in the Cases of Kann v. United States, 323 U. S. 88, 94, 65 S. Ct. 148, 150, where the court said:

> "The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any Consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme as the statutes require."

The Court of Appeals in the Case at bar said in its opinion:

> ". . . Appellant's argument that he is to be freed of such fraud because (the bank) National, upon

receipt of the checks in question, immediately credited Star's (defendant's) account and permitted him to withdraw funds so credited, before such checks were through the Federal Reserve Bank of St. Louis, is without merit."

These two statements are in conflict.

The Court of Appeals here in its opinion said of the defendant:

". . . That he knew and intended to have the above checks 'Cleared' and charged against the bank account of those investors cannot be in doubt. Therefore, appellant's device, scheme, and artifice, to defraud such duped investors was not dispelled by his deposit of their checks in National (this bank) and securing credit therefore."

This is in direct conflict with the principle established by the United States Supreme Court in **City of Douglas v. Federal Reserve Bank of Dallas, 217 U. S. 489, 492; 46 S. Ct. 554, 556, 70 L. Ed. 1051,** where it says:

"(W)hen paper is indorsed without restriction by a depositor, and is at once passed to his credit by the bank to which he delivers it, he becomes the creditor of the bank; the bank becomes the owner of the paper, and in making the collection is not the agent for the depositor."

The latter pronouncement of the Eighth Circuit Court, above, from the Opinion in this case, is definitely in conflict with the pronouncements of the Supreme Court covering the same principles, also, as recognized by Judge Learned Hand, in the case of **United States v. Taylor, 217 F. 2d 397, l. c. 398,** where he says of this situation:

"It recognized that in Kann v. United States, 323 U. S. 88, 65 S. Ct. 148, 89 L. Ed. 88, it had held that

> a swindler does not violate the 'Mail Fraud Act 3" when in pursuance of a fraudulent scheme he cashes in State A a cheeque dfawn upon a bank in State B although he knows it will be transported to State B."

The conflict between the Eighth Circuit Court of Appeals pronouncement and the Principles announced by the Supreme Court should be resolved, and the court should make it clear that the same principles announced as controlling in the "Mail Fraud Act" are also applicable to the "Securities Act", as some of the other Circuits have already discovered.

(b)

The Court of Appeals for the Eighth Circuit has here rendered an opinion in conflict with decisions and opinions of other United States Courts of Appeals on the same matters as those involved and decided in the Case at bar.

The Court here in its opinion said:

> "The *Kann* and *Parr* cases, *supra* cover prosecutions under the Mail Fraud Statute, 18 U. S. C. A. 1341, or conspiracy to do so, in violation of 18 U. S. C. A. 371. We do not consider the facts in those prosecutions, under the Mail Fraud Statute, to be wholly apposite to appellant's prosecutions for violation of Section 17 (a) of the Securities Act of 1933, supra."

This statement is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit in the case of **Carroll v. United States (1963-C. C. 9), 326 F. 2d 72.** Where the Indictment charged a violation of the Section 17 (a) of the Securities Act, the same see

tion involved in the case at bar. The Ninth Circuit Court said at points (20-21) ———

> "(20-21) . . . Kann v. United States (1944), 323 U. S. 88, 65 S. Ct. 148, 89 L. Ed. 88, is we think analogous. There, the Supreme Court pointed out that the fraudulent scheme involved (mail fraud) was completed when the defendant received the money that was intended to be obtained by their fraud, and that certain subsequent transactions (banking transactions) were merely incidental and collateral to it, and not a part of it."

The Eighth Circuit Court decided two things directly in conflict with that Ninth Circuit Court Case which decided that: (1) The scheme in a Securities Act Case and the scheme in a mail fraud case are both completed when the defendants receive the money and, (2) That the principles announced by the Supreme Court in the **Kann** Case are controlling in a Section 15 Securities Act Case as well as in a Mail fraud case.

The decision and opinion in the case at bar, by the Eighth Circuit Court is also in direct conflict with the principles and decision as announced by the Court of Appeals of the Fifth Circuit in the case of,

Getchell v. United States, 282 F. 2d 681 (1960—5 C. C.).

The Court in the opinion of the case at bar held the **Kann** and the **Parr** cases to be of a different generi than the cases which are brought under Section 15 of the Securities Act yet the Fifth Circuit Court treats these cases as controlling and applicable when it considers a violation under Section 15 when it says:

> ". . . Compare Parr v. United States, 363 U. S. 370, 80 S. Ct. 1171, 4 L. Ed. 1277. It was at most 'merely incidental and collateral to the alleged scheme

and not a part of it,' Kann v. United States, 1944, 323 U. S. 88, 95, 65 S. Ct. 141, 151, 89 L. Ed. 88."

Getchell v. United States, *supra*.

The Court in the Getchell case treats both the Securities Act violation and the mail fraud violations to be governed by the principles of **Kann** and **Parr.** This is directly in conflict with the decision and opinion in the case at bar by the Eighth Circuit Court of Appeals.

(c)

The Court of Appeals for the Eighth Circuit has here rendered an opinion, which takes the position that there is a distinct difference in the principles applicable to consideration of the violations under the Securities Act, from those under the Mail Fraud Act, as related to the use of the mails or interstate transportation of checks deposited for immediate credit in a bank. As the Court said in its opinion in this case:

> "There can be no question about the proof essential to sustain convictions under the Mail Fraud Act, as considered in **Kann, Parr,** and other cases cited by Appellant, supra. But we are not here concerned with a prosecution for 'mail fraud'."

The court in a few paragraphs further on, says:

> **"So considered, the crucial question presented by this appeal is whether the clearance of the duped investors' checks through National and the Federal Reserve Bank in St. Louis, was either a 'direct or indirect use of the mails' by appellant in execution of his scheme to defraud, as established by the evidence here."**

Therefore, if the evidence in this case was to the effect that the defendant deposited the investor's checks in the

Tennessee bank and received credit immediately in his account or drew cash against them immediately, the same day (and it was), then the situation extant in the Taylor case, supra, and the Kann and Parr cases, supra, is being subjected to a new, novel and rejected theory.

Unfortunately, we could find no case where the United States Supreme Court has definitely stated that the same principles applied in the "Mail Fraud" cases of Kann and Parr apply to the "Securities Act" cases in determining federal jurisdiction in situations such as this, and the question should be decided, since it does give rise to some confusion and conflict among the Circuit Courts.

CONCLUSION.

For all of the above reasons and grounds and to insure uniform interpretations and principles of law applicable to all defendants in all the fifty States and Federal Districts, and to insure a fair trial to this defendant and to others indicted or charged with violations of the Securities Act of 1933, this defendant prays the Supreme Court to issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review the decision in this case, and this the defendant will ever pray.

Respectfully submitted,

MALCOLM FRANK and

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APPENDIX.

Judgment and Commitment.

(Filed June 17, 1963, Harold G. Pryce, Clerk, U. S. District Court, E. Dist. of Mo., St. Louis.)

United States District Court
For the Eastern District of Missouri,
Eastern Division.

United States of America
v.
James E. Little.
} No. 62Cr256(1).

On this 17th day of June, 1963, came the attorney for the government and the defendant appeared in person and with Murray Randall, his attorney.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, entered February 1, 1963, and a jury verdict of guilty, entered April 19, 1963, of the offenses of knowingly, willfully and unlawfully employing a device, scheme and artifice to defraud certain investors in oil and gas leases, and using means and instruments of transportation and communication in interstate commerce in pursuance of aforesaid scheme:

In violation of Sec. 77q (a) T. 15 U. S. Code, as charged in each of counts One, Two, Four, Five, Six, Seven, Eight and Nine of Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS as to and under the charge contained in each of Counts 1, 2, 4, 5, 6, 7, 8 and 9 of Indictment, such terms to begin, run and terminate concurrently with each other.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Roy W. Harper,
Roy W. Harper,
United States District Judge.

Harold G. Pryce,
Clerk.

(By) Ellen C. Donovan,
Deputy Clerk.

Judgment.

(Filed May 6, 1964, Robert C. Tucker, Clerk.)

United States Court of Appeals
For the Eighth Circuit

No. 17,401, September Term, 1963.

James E. Little,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further ordered by this Court that the defendant in the said District Court, James E. Little, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

May 6, 1964.

Order entered in accordance
with Opinion:—

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

Opinion of the Court of Appeals.

United States Court of Appeals
For the Eighth Circuit.

No. 17,491.

James E. Little, Appellant. v. United States of America, Appellee.	Appeal from the United States District Court for the Eastern District of Missouri.

[May 6, 1964.]

Before Van Oosterhout, Ridge and Mehaffy, Circuit Judges.

Ridge, Circuit Judge.

Appellant was convicted on eight (8) of the ten (10) counts of an indictment duly returned, charging violations

of Section 17(a) of the "Securities Act of 1933."[1] 15 U. S. C. A. 77 q (a). He appeals from concurrent sentences imposed therefor. Two counts of the indictment were dismissed by the Government before their submission to the jury.

The primary issue raised and to be resolved in this timely appeal relates to the "use of the mails, directly or indirectly" to bring appellant's violations of the Securities Act, *supra*, as a crime within federal jurisdiction. As that issue is here presented there is no question as to the sufficiency of the evidence to establish fraudulent representations as having been made by appellant to induce certain identified investors to purchase specifically described worthless "securities"[2] as detailed in each count of the indictment on which he was found guilty. Hence it is sufficient to presently state that on the evidence adduced, the Government established facts from which the jury could have found, beyond a reasonable doubt, that appellant, at all times here material, did knowingly and intentionally make certain false and untrue statements to induce identified investors, living in St. Louis County, Missouri, who had checking accounts with banks situate in that State, to deliver to him checks drawn on such banks, payable to the Star Oil Company, as a means of purchasing worth-

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[1] 15 U. S. C. A. 77q (a): "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

[2] "Fractional undivided interest in oil" leases. § 77 (b) (1), T. 15, U. S. C. A.

less, fractional interests in oil and gas leases, described as "Blackburn Leases A and B," located in Green County, Kentucky. None of the material representations established as inducing such investors to make those purchases were true. As a consequence, appellant was duly indicted for violation of Section 17 (a) of the Securities Act, *supra*.

In each count of the indictment returned; it was specifically charged; among other things, that appellant by the use of the means and instruments of transportation and communication in interstate commerce"—did—"unlawfully, willfully and knowingly—employ (a) device, scheme and artifice to defraud and obtain money and property" from the person duped, by "unlawfully, willfully and knowingly" causing a check, identified in each count of the indictment, "to be delivered by the means and instruments of transportation in interstate commerce—from Memphis, Tennessee, to Federal Reserve Bank of St. Louis, St. Louis, Missouri,"—payable against the account of the duped investor—which check appellant "deposited with the National Bank of Commerce in Memphis, Memphis, Tennessee" (hereinafter called "National"), all "in violation of Section 77q (a)," *supra*.

It was on February 9, 1959, that appellant opened a checking account under the name of Star Oil Company[3]

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[3] The Star Oil Company was organized February 7, 1959. Its incorporators were three attorneys in the office of counsel employed by appellant to secure the incorporation of Star. The record before us is silent as to the capital structure, if any, of Star at time of incorporation. The stock record book of Star, introduced as an exhibit, reveals one certificate for 1,000 shares, issued in the name of appellant, but "never 'actually executed" by any officer of Star.

From the testimony of appellant it appears that he was president and his wife was secretary. Obviously, the "doctrine of corporate alter ego" is clearly applicable here. (Cf. *Geary v. Cain*, 70 Utah 268, 9 P. 2d 396, 398.)

The legal fiction of Star Oil Company should be ignored, "to prevent fraud and accomplish justice" under the facts established in the case at bar.

with National. Each of the checks received by appellant from the duped investors was, by false representation, made payable to "Star", at the specific direction of appellant and accordingly deposited by him in "Star's" checking account. Though appellant admittedly transported such checks from St. Louis, Missouri, to Memphis, Tennessee,—to bring him criminally within the ambit of Section 17(a), *supra*, each count of the indictment only charged a "transportation in interstate commerce" of each such check by "means and instruments of transportation and communication in interstate commerce—from Memphis, Tennessee, to St. Louis, Missouri." The various counts of the indictment alleged the transportation to be either "via the "Railway Express Agency" or by "United States Mail."

The Government's evidence established each of the checks was deposited with National, in respect to deposit slips which established that National acted only as Star's collection agent in securing the proceeds of the checks. All such checks were received by National for deposit "with the distinct understanding that credit" thereof to Star's checking account was "subject to final payment and to receipt of proceeds of final payment in cash or solvent credit" to National, "at its own office." Notwithstanding such contractual conditions, it is appellant's contention that the checks "were not deposited for collection" but that National became a "holder in due course" thereof. Hence he says he may not be held responsible for National's transportation of the checks for "clearance" which admittedly he knew would be by use of the "mails" or other means of interstate commerce. More specifically, it is appellant's contention that because it was National's practice, unless overdrafts appeared, to immediately credit Star's checking account with the amount of the duped depositor's checks, as and when they were deposited, and appellant was allowed to make withdrawals from such ac-

count, against the amount so credited, before the duped investor's check was "cleared" through the Federal Reserve Bank of St. Louis, he cannot be found guilty of violating Section 17(a), *supra*. So contending, appellant argues that under the law relating to "bills and notes" and "banking"—National thereby became a "holder in due course" as to each such check when it was deposited with National. Under such circumstances, appellant asserts, "the mailing or transportation" of the checks here considered could not have been caused by him, "directly or indirectly"; and that under the above circumstances National, as a matter of law, cannot be considered as being an agent for or on his behalf, as the Government here contends.

It is on the above singular hypothesis that appellant asserts he cannot be found guilty of violating Section 17 (a), *supra*, and seeks to have his convictions set aside. As support therefor, appellant relies on the following authorities: **Kann v. United States**, 323 U. S. 89 (1944); **Parr v. United States**, 363 U. S. 370 (1960); **Douglas v. Federal Reserve Bank of Dallas**, 271 U. S. 489 (1926); **United States v. Schaefer**, 299 F. 2d 625 (7 Cir. 1962), cert. den. 370 U. S. 917; **Getchell v. United States**, 282 F. 2d 681 (5 Cir. 1960); **Lowrance Motor Co. v. First National Bank**, 238 F. 2d 625 (5 Cir. 1956); **United States v. Taylor**, 217 F. 2d 397, 398 (2 Cir. 1954); **Harper v. United States**, 143 F. 2d 795 (8 Cir. 1944); **Darwin v. Jess Hickey Oil Corp.**, 153 F. Supp. 667 (D. C. N. D. Texas, 1957).

We shall not follow appellant in all the argument he undertakes to make and which he attempts to fortify by the above-cited authorities. That the contention made by appellant is not apposite to the crimes for which he was charged and found guilty; and, that the above-cited authorities pertaining to mail "fraud prosecutions," and other violations of the Securities Act of 1933 are patently

distinguishable on their facts and law applicable, is made manifest when the following propositions are contemplated and properly postulated.

The **Kann** and **Parr** cases, *supra*, cover prosecutions under the Mail Fraud Statute, 18 U. S. C. A. 1341; or conspiracy to do so, in violation of 18 U. S. C. A. 371. We do not consider the facts in those prosecutions, under the Mail Fraud Statute, to be wholly apposite to appellant's prosecutions for violation of Section 17 (a) of the Securities Act of 1933, *supra*. There can be no question about the proof essential to sustain convictions under the Mail Fraud Act, as considered in **Kann, Parr,** and other cases cited by appellant, *supra*. But we are not here concerned with a prosecution for "mail fraud."

As we said in **Harper v. United States,** 143 F. 2d 795, 801 (8 Cir. 1944):

> "The devising of a scheme or artifice to defraud or to **obtain** money by means of fraud or false pretenses is not a crime either under the Securities Act or the Mail Fraud Act. It becomes a crime only in the event that in furtherance of the scheme or artifice to sell securities **any** means or instruments of transportation or communication in interstate commerce or the mails be employed." (Emp. added.)

More recently, we said in **Creswell-Keith, Inc. v. Willingham,** 264 F. 2d 76, 80 (8 Cir. 1959):

> "The courts have uniformly held that (the Securities Act of 1933) applies when the mails are used in furtherance of a fraudulent scheme, irrespective of whether the misrepresentations were transmitted by mail or in interstate commerce.
>
> "* * * It is our best judgment that Congress inserted the mails and interstate commerce provision in (the Securities Act of 1933) for the purpose of establish-

> ing federal jurisdiction, and that Congress intended to assert its full constitutional power in granting civil relief from fraudulent transactions." (par. added.)

when related to the **sale** of worthless securities, as defined in that Act. We think that is true also as to the criminal sanctions provided in Section 17(a), *supra*.

The "evil at which the Securities Act is directed is the fraud in the **sale** of securities." **United States v. Cashin**, 281 F. 2d 669, 674 (2 Cir. 1960). That being the congressional purpose and intendment to be covered by the "Securities Act of 1933," *a fortiori*, the law of "sales" and impact of fraud in relation to "sales," rather than the principles of "banks and banking" or "bills and notes," should be considered in making practical application of that Act to a given set of facts. In other words, it is our opinion that a scheme to defraud, in relation to a sale of securities, and the use of the mails in consummation thereof, is the gist of the crime denounced by the Congress in Section 17(a) of the Securities Act of 1933, *supra*. Under that Act, the use of the mails need not be central to the scheme to defraud (Cf. **United States v. Sampson**, 371 U. S. 75 (1962); **Pereira v. United States**, 347 U. S. 1 (1954); **United States v. Sheridan**, 329 U. S. 379 (1946); **United States v. Cashin**, *supra*; **United States v. Monjar**, 47 F. Supp. 421 (D. C. Del. 1942), aff'd 147 F. 2d 916 (3 Cir. 1944), cert. den. 325 U. S. 859 (1945).) It is sufficient if the use of the mails is merely incidental to the fraudulent conduct which the Congress intended to reach and punish by the provisions of the Securities Act of 1933. **Pereira v. United States**, *supra*; **United States v. Robertson**, 181 F. Supp. 158 (S. D. N. Y. 1959), aff'd in part and reversed in part, **United States v. Robertson**, 298 F. 2d 739 (2 Cir. 1962).

So considered, the crucial question presented by this appeal is whether the clearance of the duped investors'

checks through National and the Federal Reserve Bank in St. Louis, was either a "direct or indirect use of the mails" by appellant in execution of his scheme to defraud, as established by the evidence here. Appellant's argument that he is to be freed of such fraud because National, upon receipt of the checks in question, immediately credited Star's account and permitted him to withdraw funds so credited, before such checks were cleared through the Federal Reserve Bank of St. Louis, is without any merit. The established fact is that appellant utilized National, and, through it, "means" of "interstate transportation—or—the use of mails, directly or indirectly," to have checks which he obtained as one step in his scheme to defraud investors of their money. That he knew and intended to have the above checks "cleared" and charged against the bank account of those investors cannot be in doubt. Therefore, appellant's device, scheme, and artifice to defraud such duped investors was not dispelled by his deposit of their checks in National and securing credit therefor. **Hart, et al. v. United States**, 112 F. 2d 128 (5 Cir. 1940), cert. dis. 311 U. S. 722; cert. den. 311 U. S. 684; rehear. den. 311 U. S. 726. Regardless of the language on the deposit slips and the relationship thereby created between National, Star, and appellant, the fact is that appellant's criminal conduct and intention was centrally established to be for a singular purpose, i. e., to defraud the duped purchaser, not of a "check" but of "money" as disclosed by the course of conduct appellant pursued. The gist of his fraud was to sell worthless, undivided interests in oil and gas leases and receive money from the persons whom he intended to defraud, by way of checks which he knew and intended should and would be cleared in the usual course of business and charged against their individual bank accounts in payment for the worthless securities he sold them. Under such a scheme the "impact" of his fraud on such investors did not with finality occur until the checks he

obtained from them, as a step in his unlawful scheme and artifice, reached the investor's bank and the sum of the check was charged against the duped investor's bank account. Then, and only then, did the impact of appellant's fraud fall upon those whom he intended to, and did, defraud.

In **Pereira v. United States**, *supra*, l. c. 8-9, it is said:

> "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."

Pereira, and **Hart v. United States**, *supra*, are particularly applicable to the facts here, for:

> "Unless the parties otherwise agree, either expressly or by implication, the giving of a check for goods purchased usually is only a conditional payment, whether the check is drawn on the buyer's account or on the account of another, provided it is not accepted as an absolute payment.—Ordinarily, in a sale for cash, a check is not payment until it is actually paid." Sales: § 238 (b), 77 C. J. S., 1014-1015.
>
> "Under the Uniform Negotiable Instruments Act, the provision, which has been applied in a number of cases (civil and criminal), is that a check, of itself, does not operate as an assignment of any part of the funds to the credit of the drawer with (his) bank." (Par. added.) 10 Am. Jur. 2d, § 562, p. 531. See also, § 3-409, Uniform Commercial Code, sub. (1).

Section 17(a) of the Securities Act of 1933, *supra*, is clear—if the mail is "used in employing the scheme, however incidental the mailing may be"; a prosecution thereunder may be sustained (**United States v. Schaefer**, 299 F. 2d, l. c. 630); and it is particularly recognized that prose-

cutions under that Act are "broader" than those under the Mail Fraud Statute, "depending on whether fraud or the use of the mails is considered to be the gist of the offense" as proscribed by Section 17 (a), *supra* (Cf. **Getchell v. United States**, 282 F. 2d 684.)

That the scheme to defraud is the evil intended to be controlled and remedied by passage of the Securities Act, *supra*, cannot be in doubt, in the light of what is said in **Wilko v. Swan**, 346 U. S. 430-431 (1953). There, Mr. Justice Reed stated:

> "In response to a Presidential message urging there be added to the ancient rule of *caveat emptor* the further doctrine of 'let the seller also beware,' Congress passed the Securities Act of 1933. Designed to protect investors, the Act requires issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale."

Our conclusion reached in **Creswell-Keith, Inc. v. Willingham**, *supra*, is wholly compatible with the congressional intendment of the Securities Act of 1933, *supra*. It has been followed in **United States v. Cashin**, *supra*; **United States v. Robertson**, *supra*; **United States v. Hughes**, 195 F. Supp. 795 (D. C. S. D. N. Y. 1961). Cf. also, **Roe v. United States**, 316 F. 2d 617 (5 Cir. 1963). Since the dominant purpose of the Securities Act was to prevent the victimizing of investors, a defrauder may not evade prosecution thereunder if he takes a check and negotiates the same to secure the money he wanted, where any medium of interstate commerce, "directly or indirectly" is used for that fraudulent purpose. It is here clearly established that appellant knew the "mails would be used directly or indirectly" in carrying the impact of his fraud to those he intended to victimize. Looking at those transactions in their entirety and reality, it is our opinion that when

appellant deposited the defrauded investors' checks at National he could only have contemplated that in due course, and as a direct result of such action, the mails or other means of interstate commerce would be used to complete the fraud he intended to perpetrate in the sale of the securities as here to be considered. Cf. **United States v. Doran**, 299 F. 2d 511, l. c. 515 (1962).

There is no merit to appellant's contention that the indictment returned against him, and each count thereof, was insufficient to state a crime under Section 17 (a) of the Securities Act of 1933; nor that the evidence was insufficient to establish federal jurisdiction over such crime, or to support his verdict of guilty.

Appellant, by after-trial motion timely filed, seeks another trial on such indictment because of alleged juror misconduct. The first assignment so made relates to a conversation Donald Dunn, one of the jury at defendant's trial, had with Fred W. Rowe, III, a Government witness. It occurred in the Coffee Shop in the Federal Courthouse in St. Louis, Missouri, during appellant's trial. Upon being informed thereof, prior to return of the jury's verdict in this case,—District Judge Harper, in open court in the presence of defendant and the assembled jury, stated:

> "A matter has arisen which I think that I should inquire of you individually about. It has been suggested that someone on the jury may have discussed or talked to one of the witnesses in this case, and would you just give me a yes or no answer as I call the list?"

Upon poll of the jury, Juror Dunn answered, "Yes". Upon specific inquiry by Judge Harper, made before the jury's verdict was received, addressed to Juror Dunn: "Did you discuss in any way the matter of the case?" a

negative answer was received from Juror Dunn. Counsel for appellant was thereupon permitted to propound more specific questions to Juror Dunn. Upon being satisfied after such inquiry that there was no "conversation of any nature concerning this case" between Juror Dunn and the witness, Rowe, the jury's verdict was received by the Court. Thereafter, and after motion for new trial was timely filed, a more specific and exhaustive hearing was held by Judge Harper on the two assignments appellant makes as to juror misconduct. At that hearing, counsel for both parties, by way of cross-examination, extensively probed such assignments of error, particularly as to Juror Dunn's conversation with Rowe; as well as appellant's assignment of error made in relation to the alleged failure of Juror Eilermann, foreman of appellant's jury, to disclose on voir dire examination acquaintance or business dealings he may have had with Mr. Morris A. Shenker, senior member of the law firm of which appellant's trial counsel was a member.

It appears in this record that the law firm of counsel for appellant had some previous litigation in which Eilermann Transfer Company and Ace Cab Company were involved. Mr. Eilermann on voir dire examination, disclosed that he was Vice President and Secretary of the Eilermann Transfer Company. Notwithstanding, it is appellant's counsel's contention that Mr. Eilermann failed to disclose the pendency of the litigation in which Ace Cab Company and Eilermann Transfer Company were parties. The record does not reveal whether they were opposing or joint parties to that action. However, it does appear that Eilermann Transfer Company was represented by counsel for a liability insurer in respect to that action. The firm of Morris A. Shenker and Associates represented Ace Cab Company. It was Juror Eilermann's testimony at the post-trial hearing that he did not know that Mr.

Shenker or his associates were counsel for Ace Cab Company, and there is not a particle of evidence in the record before us ever suggesting a chimera suspicion *contra*.

As to the conversation Juror Dunn had with Rowe, a reasonable inference to be made from the record here is that the only matters discussed between those parties concerned the weather in St. Louis, perhaps, the making of whiskey, and horse racing in Kentucky where Rowe resided. But, in the course of the conversation, it is established that some reference was made either by Mr. Rowe or Juror Dunn, relative to "this mess upstairs."

We have meticulously examined in the record before us all that relates to the above assignments of error. We, like District Judge Harper, can find no merit to appellant's claim of reversible error as a consequence of either situation.

We are cognizant that:

> "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to defendant." **Remmer v. United States**, 347 U. S. 227, 229 (1954).

We are also mindful that what influences a particular juror in every situation necessarily is vague and indefinite.

However, it is well settled that what is prejudicial to a fair trial when the issue of "juror misconduct" is raised, is a matter that must, to a large extent, be left to the discretion of a trial court and that an appellate court will not

reverse the determination of that court on such an issue unless it is established as clearly erroneous. **Mattox v. United States**, 146 U. S. 140, 147; **Wheaton v. United States**, 133 F. 2d 522 (8 Cir. 1943); **United States v. Flynn**, 216 F. 2d 354 (2 Cir. 1954); **Holmes v. United States**, 284 F. 2d 716 (4 Cir. 1960).

In the **Wheaton** case, *supra*, Judge Sanborn, speaking for this Court, said:

> ". . . Communications, relative to a case on trial, between jurors and third persons, or witnesses, or the officer in charge of the jury, are absolutely forbidden, and if it appears that such communications have taken place, . . . there is a rebuttable legal presumption that (such communications) were prejudicial . . . ."

Under the facts here, we think that any presumption of prejudice that might exist because of Juror Dunn's conversation with Rowe has been clearly rebutted.

As to the assignment of error regarding Juror Eilermann, we are not persuaded that Judge Harper's ruling thereon was "clearly erroneous." Cf. **Stanczak v. Penn. R. Co.**, 174 F. 2d 43, 48 (7 Cir. 1949); **Christian v. Hertz Corp.**, 313 F. 2d 174 (7 Cir. 1963); **Brown v. New York Indemnity Co.**, 39 F. 2d 443 (8 Cir. 1930).

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Filed June 3, 1964; Robert C. Tucker, Clerk.)

United States Court of Appeals
for the Eighth Circuit.

No. 17401.

James E. Little,

Appellant,

v.

Order.

United States of America,

Appellee.

On the Court's own motion, the last paragraph of the opinion filed in the case at bar on May 6, 1964, is stricken therefrom.

Appellant's motion for rehearing is denied.

June 3, 1964.